LEGISLATIVE SERVICES AGENCY

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In This Edition

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Tuesday, October 9, 2012

Administrative Rules Review Committee

9:00 a.m., Room 116, Statehouse

Agenda: Published in the Iowa Administrative Bulletin:
http://www.legis.state.ia.us/aspx/BulletinSupplement/bulletinListing.aspx

ADMINISTRATIVE RULES REVIEW COMMITTEE
September 11, 2012

Chairperson: Senator Wally Horn
Vice Chairperson: Representative Dawn Pettengill

EDUCATION DEPARTMENT, *Pretesting of Candidates for Admission to Teacher Preparation Programs*, 08/22/12 IAB, ARC 0299C, NOTICE.

Background. This rulemaking implements 2012 Iowa Acts, SF 2284, section 39, relating to pretesting of candidates for admission to teacher preparation programs. Whereas, presently teacher preparation programs are required to administer a "basic skills test" to admission candidates, the new legislation requires that the test be "a preprofessional skills test offered by a nationally recognized testing service." The new legislation also imposes a new requirement that, prior to completion of the program, each student in a teacher preparation program achieve scores above the 25th percentile nationally on an assessment that measures pedagogy and knowledge of at least one subject area.

Commentary. The department director explained the rulemaking and the underlying statute. He noted that the effective date of the new testing requirements would be January 1, 2013, to allow current admission candidates a chance to conform to the new standards. The new standards will not apply to those seeking relicensure. Members verified that the January 1 date means that the new requirements will not affect students who were already planning on testing in fall 2012. Members repeatedly expressed concern that this rule change would negatively affect the current senior class of candidates, who will be testing soon, but after January 1. Members felt it would be unfair to those students to change standards so close to the end of their programs. The director replied that the immediate effective date in the underlying legislation required him not to delay implementation, regardless of the fairness issue.

Members asked how the 25th percentile is figured, and the director explained that it is based on a three-year national average. Members sought clarification as to the precise timeline for when testing must occur and expressed concern that this was not clear in the rulemaking. The director explained that the testing is not a graduation requirement, but is required before a candidate can be licensed. Members asked if a test taken in another state could satisfy the requirement, and the director replied that it could. Members asked if school districts might use the new percentile requirement to impose hiring standards requiring more than the 25th percentile. The director explained that only the candidate will know the final score; districts will only know if the candidate met the percentile requirement or not.

Public comment was received from a representative of the Iowa Association of Colleges for Teacher Education, who asked that the effective date be moved back to July 1, 2013, for the sake of allowing current candidates, as well as colleges which may have to make curriculum adjustments for education students, more time before conformance is required. Public comment was received from a legislator who asked why a pilot project which will soon be complete was not included as an alternative means of satisfying the testing requirement. She was given the impression that this had been provided for in statute. The director replied that he would not consider the pilot project until it is actually complete. Members requested that the director provide the committee with all comments received about the rulemaking before it is finalized.

Action. No action taken.

ENGINEERING BOARD, *Ethics*, 08/08/12 IAB, ARC 0264C NOTICE.

Background. Board rules prohibit a licensee from soliciting or accepting an engineering or land surveying contract from a governmental body when a principal or officer of the licensee's organization serves as an elected, appointed, voting, or nonvoting member of that governmental body. The board adds detail to this existing prohibition.

Commentary. Discussion clarified the application of this policy. For example, a licensee who sits as a member of a town council cannot perform engineering or land surveying work for that town. Board representatives confirmed that a licensee who is a state legislator could provide service to the executive branch.

Action. No action taken.

HISTORICAL DIVISION, *Archeological Site Survey*, 08/08/12 IAB, ARC 0267C and 0268C, ADOPTED.

Background. The State Historic Preservation Office (SHPO) receives an annual federal grant which requires compliance with the federal law. As part of those requirements, any entity receiving federal funds must make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.

Commentary. Under the new law, Iowa Code section 303.18 the SHPO shall only recommend that a rural electric cooperative or a municipal utility constructing electric distribution and transmission facilities for which it is receiving federal funding conduct an archeological site survey when the SHPO has determined that a historic property is likely to

(Administrative Rules Review Committee continued from Page 2)

exist. The SHPO cannot require a level of archeological identification effort which is greater than the reasonable and good faith effort required by the federal law.

The rules provide that the recommendations and decisions of the SHPO are subject to the review and approval of the director, and an appeal process is provided. Opponents contend that the department director should not have final authority to overrule the SHPO, or that the director's discretion should be limited by specific standards and criteria established in rule.

Rural electric cooperatives supported these revisions noting that surveys can be expensive and create needless delays.

Action. No action taken.

PUBLIC EMPLOYMENT RELATIONS BOARD, *Fees of Neutrals*, 08/08/12 IAB, ARC 0262C, NOTICE.

Background. This rulemaking raises the maximum rate qualified arbitrators and teacher termination adjudicators are entitled to charge from $800 per day to $1,200 per day. This rate is set by the board pursuant to Iowa Code section 20.6(3). This rate has not been updated in five years, and the board believes it is insufficient.

Commentary. A representative of the board explained the rulemaking. She stated that the current rate is under market, which has resulted in the board losing a few arbitrators every year. She noted that this cost is split evenly between the two parties. Members asked what qualifications one needs to become an arbitrator. The representative said that while the board has set standards, they have not been codified in the board's rules. She said they would be codified at a later point, and she would provide them to committee members. Members asked how this rate compares to neighboring states, and the representative replied that some states do not have maximum rates, while others tend to have higher rates than Iowa. Members asked if this rate includes other expenses, and the representative replied that it does not. Members expressed concern about out-of-state arbitrators being used when arbitrators from Iowa are preferable, for reasons of cost and familiarity with Iowa law. Members also expressed concern that the proposed rate is excessive.

Action. No action taken.

SECRETARY OF STATE, *Noncitizen Registered Voter Identification and Removal Process,* 08/8/12 IAB, EMERGENCY.

Background. The Secretary of State has adopted emergency rules for a process to determine whether noncitizens have improperly registered to vote. Under this process the state registrar will periodically obtain lists, from a federal or state agency, of foreign nationals who are residing in Iowa. The list will be matched against the voter registration records to determine likely matches based on predetermined search criteria.

Commentary. Using existing information the Secretary determined that over 3,000 foreign nationals had registered to vote, although more up-to-date information is required before any action could be taken. The Secretary is seeking access to a federal database which would allow investigators to match voter registration with citizenship. In response to a committee question the Secretary stated that an investigator is being paid using federal HAVA (Help America Vote Act) funds.

The Secretary stated that individuals would be initially contacted with a simple enquiry concerning voter eligibility and a request for more information. If no response is made a more forceful communication would follow. The Secretary stated a due process hearing would precede any final action.

Some committee members complained that that there is no real evidence that a problem exists and questioned whether a foreign national would risk a felony charge in order to vote. A member stated that such a program, if needed, should be enacted through the legislative process, not through rulemaking. Members also questioned the need for an "emergency" filing, since action could not now be taken before the November elections.

Members of the public spoke against the new procedures; speakers questioned both the need and the statutory authority for the program. Speakers noted that the program could intimidate naturalized citizens from registering to vote, noting that many immigrants fear any interaction with government based on their earlier experiences.

Action. No action taken.

REVENUE DEPARTMENT, *All-terrain Vehicles Used in Farm Production,* Rules 18.44, 226.17, SELECTIVE REVIEW.

Background. Under Iowa law the purchase of certain machinery or equipment is exempt from the collection of sales tax if it is directly and primarily used in production of agricultural products. The term "agricultural production" means a

(Administrative Rules Review Committee continued from Page 3)

for-profit farming operation raising crops or livestock. An all-terrain vehicle (ATV) is frequently used in agricultural operations, such as for daily checking and feeding of cattle, spraying for weeds, and checking fences. At issue is whether ATVs can qualify for this exemption. These items are considered taxable unless shown otherwise.

Commentary. The department has interpreted "directly and primarily" to mean that exempt use must be greater than 50 percent of total use. The term "directly used" means the use is an integral and essential part of production as distinguished from use that is incidental or merely convenient to production or use that is remote from production. Committee members were generally of the opinion this definition is too restrictive.

Action. General referral.

TRANSPORTATION DEPARTMENT, *Rest Area and Highway Helper Sponsorship Programs, Competition with Private Enterprise*, 07/11/12 IAB, ARC 0187C, 70-DAY DELAY.

Background. The department adopts two new cleanup programs for rest stops and highways. The rest area sponsorship program allows a person, a firm, or an entity to sponsor a rest area by providing a monetary contribution, in exchange for an acknowledgment sign on the main-traveled way of an interstate highway and an interior sign within the primary rest area building. The sponsors will provide the sign, which must measure 24 inches high and 48 inches wide. The department reviews the acknowledgment sign proposed by the sponsor; the acknowledgment will not contain an advertisement or a partisan endorsement.

The highway helper sponsorship program allows a person, a firm, or an entity to provide a monetary contribution to assisting in the funding of that service, in exchange for an acknowledgment sign on the main-traveled way of an interstate highway patrolled by the highway helper vehicles.

At the committee's August meeting, members expressed concern about the state granting more naming rights to state resources than it already has, and how far such a trend might go. Members also expressed concern about whether sponsors inappropriate for such a setting might win a bid, and whether there might be free speech implications in denying such bids. A motion for a 70-day delay of this rulemaking carried. The committee requested further review at the September meeting.

Commentary. A representative from the department responded to questions raised by the committee at its August meeting. On the issue of potentially controversial sponsors, the representative explained that the Attorney General is satisfied with the language currently in the rulemaking and that new language had been added to the request for proposals (RFP) for these programs specifying that the signage cannot contain political endorsements or statements that may have an "adverse effect" on the state. Similar language has been used before in a highway context. The Attorney General has asked the department to avoid any language prohibiting "offensive" material, as that may raise questions regarding the First Amendment. The representative stated that signage from issue advocacy groups would most likely be acceptable. However, groups would need to certify that they do not discriminate, which could prove problematic for a group such as the Boy Scouts. The representative noted that legal challenges may arise no matter what standards the department sets.

Members asked if the Legislature had authorized participation in these programs, and the representative said it had not. Members asked if funds from these programs had been earmarked yet, and the representative said no, although they would be used for roads. Members asked if out-of-state sponsors could participate, and the representative said yes. Members asked if a legislator could be a sponsor in a nonelection year, or if that would violate the prohibition on political endorsements. The representative was unsure. Members expressed discomfort with the programs in general, and particularly with respect to who might or might not be able to become a sponsor. A motion was made for a session delay of these rules, which will delay the effective date of the rules until the adjournment of the 2013 Session of the General Assembly. The motion carried.

Action. Session delay.

Next Meeting. The next regular committee meeting will be held in Statehouse Committee Room 116, on **Tuesday, October 9, 2012,** beginning at 9:00 a.m.

Secretary ex officio: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Staff: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=53

LEGAL UPDATE

Purpose. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

LEGAL UPDATE—IOWA'S STANDARDS FOR PUBLIC SCHOOLS

Filed by the Iowa Supreme Court
April 20, 2012

King v. State of Iowa, et al.

No. 08-2006

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20120420/08-2006.pdf

Background Facts and District Court Decision. Attorneys for 16 plaintiffs, who are students or parents of students who attended or currently attend public schools in the Davenport, Des Moines, or West Harrison Community School Districts, filed a petition in the Iowa District Court for Polk County for a declaratory judgment "that the current educational system is unconstitutional and that defendants failed to provide equal access to an adequate education delivery system as guaranteed in the Iowa Constitution and the Iowa Code." Plaintiffs further sought "an injunction ordering Defendants to provide all Iowa students with an effective education," and an order of mandamus and injunction injunctive relief "requiring Defendants to establish (or direct the legislature to establish), and enforce an educational system that satisfies Plaintiffs' constitutional rights and prepares Plaintiffs and other similarly situated parties of this state to meet and exceed the technological, informational, and communications demands of a 21st century society."

Plaintiffs alleged that Iowa has slipped in the quality and quantity of education it offers its young citizens and fails to prepare students to meet the increasingly higher challenges posed by the economic and demographic changes facing Iowa and the U.S. Plaintiffs further alleged that disparities in educational outcomes and opportunities based on "where one goes to school" exist in the state.

The defendants filed a motion urging dismissal of the plaintiffs' constitutional claims on the grounds that they were nonjusticiable, (beyond the reach of the judicial branch and more appropriate for the legislative process), that the plaintiffs failed to state a claim, there is no private cause of action under Iowa Code section 256.37, mandamus did not lie, the Governor could not be sued, and the Iowa Administrative Procedures Act was the exclusive means of obtaining review of acts or omissions by the Department of Education.

The district court found the plaintiffs had stated claims for relief under the equal protection clause, but found their constitutional claims presented a nonjusticiable political question. Further, plaintiffs' statutory claim under Iowa Code section 256.37 (*School Restructuring and Effectiveness — Policy — Findings*) failed because that provision does not afford a private right of action. The district court dismissed the plaintiff's petition, and the plaintiffs appealed the district court's ruling granting the defendants' motion to dismiss.

Procedure. The case was argued before the Iowa Supreme Court (Court) in March 2010, and the case was reargued in June 2011 after Justices Mansfield (the author of the majority opinion), Waterman, and Zager joined the Court. During oral argument, plaintiffs argued that "Iowa's educational system is not adequately serving students in either the largest (e.g., Davenport and Des Moines) or the smallest (e.g., West Harrison) school districts."

Justice Mansfield noted that the "elected branches of our state government are currently engaged in an active debate about state educational policy. They are entitled to know whether this lawsuit may affect their policy choices." He further stated that "[i]t would be an abnegation of our responsibility not to reach a legal question about the sufficiency of the plaintiffs' pleadings that was fully developed and decided by the district court."

Issues.

1. Whether the education clause of the state's constitution "imposes judicially enforceable obligations on Iowa's legislature to promote education by 'all suitable means'."
2. Whether the defendants violated the equal protection clause of the state's constitution.
3. Whether the defendants violated the due process clause of the state's constitution.
4. Whether a private right of action may be inferred from Iowa Code section 256.37.

(Legal Update—Iowa's Standards for Public Schools continued from Page 5)

Analysis and Holding

The Education Clause. The Court observed that the education-related provisions in the 1857 Constitution of the State of Iowa were enacted in two divisions. The first division established a state board of education and conferred upon it the powers and duties relating to education policy. According to the Court, the first division entrusted the "educational interest" to the board of education and made clear in the second division that "[t]he educational and school funds and lands, shall be under the control and management of the General Assembly of this state."

Article IX, Division 1, section 12 also provided that "[a]t any time after the year 1863, the General Assembly shall have power to abolish or re-organize said Board of Education, and provide for the educational interest of the State in any other manner that to them shall seem best and proper." The Court also noted that though the Legislature abolished the board and replaced it with a superintendent of education, the citizens of the state never repealed the substance of 1857 Article IX, Division 1, section 12.

The second division sets forth provisions relating to the funding of education, including a provision establishing a perpetual support fund for the deposit and distribution of certain proceeds for the support of schools. The language of the second division "supports a construction of the education clause as a funding provision, which allocated to the general assembly the authority to provide money for education, and thereby to encourage [various forms of improvement] by all suitable means."

The Court observed that the founders defeated, by a vote of 25 to 8, an amendment to the section establishing the fund which would have required the state to guarantee a free public education. If the founders did not intend to ensure a free public education, the Court opined, it seems untenable to argue that the section contained a judicially enforceable right to a free public "with certain minimum standards of quality." The Court emphasized that Iowa's education clause does not require that the state's public education system be "adequate," "efficient," "quality," "thorough," or "uniform."

The Court reviewed the language of the state's constitution, the debates leading to the language, and certain cases decided by the Court shortly after the 1857 Constitution was ratified, and determined that "[s]ince the contemporary view of our court was that the education clause did not even allow the legislature to establish public schools, it seems difficult for us to conceive that the clause could have been seen as a source of enforceable minimum standards for such schools."

Although the Court stated that "[i]t is a well-established principle that the courts will not intervene or attempt to adjudicate a challenge to a legislative action involving a "political question,"" and reviewed thoroughly case law regarding the question of whether the education clause presents a political question, the Court concluded that it did not need to decide today whether plaintiffs' claims under the education clause present a nonjusticiable political question. The Court stated "[i]t is sufficient for present purposes to hold that Iowa's education clause does not afford a basis for relief under the allegations in this case."

The Equal Protection Clause. The Court did not "agree with the district court's conclusion that plaintiffs' equal protection claim presents a nonjusticiable political question," because the Court typically decides "…claims brought by individuals who allege denial of their constitutional right to equal protection, even when the claim pertains to an area where the legislative branch has been vested with considerable authority." In a previous case, the Court held (1) that "students have a due process right to an adequate education, although we did not characterize it as a fundamental right," (2) "there is no due process right to be educated in a particular school district," and (3) "…a funding mechanism that assured roughly the same amount of per-pupil funding regardless of the district did not treat students differently or violate equal protection." However, the Court, in that case, also noted "that debates over whether 'centralization of schools improves the quality of education belonged in the legislature and not the courts'."

For purposes of this case, the Court noted that "any equal protection claim, whether in the education context or elsewhere, requires an allegation of disparate treatment, not merely disparate impact." Plaintiffs' "petition contains no allegations of disparate treatment," nor does the petition allege "that the defendants (i.e., the state government and state officials of Iowa) have passed any law, adopted any regulation, or undertaken any measure that treats students differently from one district to another." Further, "[e]ven if we could discern some allegation of disparate treatment in plaintiffs' allegations, we would still not be persuaded that they have stated a claim. Unless a suspect class or a fundamental right is at issue, equal protection claims are reviewed under the rational basis test." The opinion noted that "[f]or purposes of federal constitutional analysis, education is *not* a fundamental right," but also noted that "[w]e defer to another day the question of whether education *can* amount to a fundamental right under the Iowa Constitution, thereby triggering heightened scrutiny."

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Under the rational basis test, the courts will uphold a law if it is rationally related to a legitimate government purpose. The plaintiffs had the burden of proving that there is no conceivable legitimate purpose to the law or that the law is not rationally related to a legitimate government purpose. As noted by the Court, "[i]n this case, unless the well-pleaded facts (if true) would show that Iowa's educational system is not rationally related to a legitimate state goal, there is no reason for the case to proceed further." The purposes for which the Court postulated the Legislature may have enacted the state's education laws may include "[l]ocal control, equity in per-pupil funding, maintenance of existing rural school districts, and conservation of scarce classroom time and resources," which the Court states "are all legitimate governmental interests." The Court opined that "[p]roviding equal resources to school districts while allowing those districts the independence to determine many aspects of educational policy is not merely 'realistically conceivable' as a legislative purpose, it is the same legislative purpose we upheld in *Exira* (*Exira Community School District v. State*, 512 N.W.2d 787, [Iowa 1994])." The Court held that "plaintiffs' equal protection claim was properly dismissed."

Substantive Due Process. The Court held that plaintiffs' substantive due process claim was justiciable. In prior cases, the Court noted it has established that "the purpose of substantive due process, is to protect citizens when the government engages in actual conduct (i.e., governmental action) that infringes or interferes with rights," and has "expressed 'serious doubt' about the viability of a substantive due process theory based on the notion that the government failed to act." The Court rejected the plaintiffs' constitutional claims, noting that "[i]n the relatively few instances where such quality-based claims have been asserted and have advanced past a motion to dismiss in other states, that has occurred because the state's founders enshrined a particular educational mandate in the state constitution." The Court further noted that an analogous mandate was voted down by Iowa's constitutional convention delegates in 1857.

Iowa Code Section 256.37. The Court held that Iowa Code section 256.37 establishes state educational policy and the provision's goals are "utopian in nature," reflecting a "legislative purpose to make only a policy pronouncement." The "law does not contain an express private right of action, so any cause of action must be implied." The law meets none of the four factors the Court uses (and which are listed and discussed in the opinion) to determine whether a private right of action may be inferred from a statute, and therefore the Court affirmed the district court's ruling that Iowa Code section 256.37 does not provide for a private right of action.

Conclusion. The Court held that the democratic process is best suited for resolution of the education issues being debated in the state, and can best accommodate the competing concerns of the many interested parties. However, though the Court affirmed the dismissal of the plaintiffs' first amended and substituted petition, it did not close the door to other actions alleging constitutional violations in the field of education. Chief Justice Cady and Justices Waterman and Zager joined in the majority opinion.

Concurrence (Special). Chief Justice Cady noted that the plaintiffs' petition, "if true, may be a call to action, but it is a call under our constitutional structure for the legislature, not the courts." Justice Waterman emphasized "the importance of judicial restraint when litigants ask courts to overstep their bounds."

Dissents. Two dissents were filed in this case. Justice Wiggins would find the plaintiffs' constitutional claims justiciable and would remand the case for further proceedings on the merits of those claims. Justice Wiggins opined that the majority and a concurring opinion "reach the merits of the plaintiffs' claims under the education clause, the due process clause, and the privileges and immunities clause of the Iowa Constitution even though the State did not raise the merits of these issues on appeal. I also dissent from these opinions because they reach the issue that plaintiffs' petition failed to state a claim. Further, I dissent from Justice Waterman's concurring opinion because he finds the constitutional claims nonjusticiable." Justice Appel filed a separate dissenting opinion, in which Justice Hecht joined which posited that "education is a fundamental interest or right under the Iowa Constitution." He further states that "[d]eprivations of a basic or adequate education should be subject to heightened judicial review, and other material differences in education should be subject to judicial review under a meaningful rational basis test." He would reverse the district court and remand the case for further proceedings.

LSA Monitor: Kathleen Hanlon, Legal Services, (515) 281-3847.

LEGAL UPDATE—WORKERS' COMPENSATION—"SUITABLE WORK" AND INDUSTRIAL DISABILITY

Filed by the Iowa Supreme Court
March 2, 2012

Neal v. Annett Holdings, Inc.

No. 10-2117, 814 N.W.2d 512 (Iowa 2012)

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20120302/10-2117.pdf

Rehearing denied May 2, 2012

Facts. In September 2007, Tim Neal (Neal) injured his shoulder while employed as an over-the-road truck driver by TMC Transportation, a division of Annett Holdings (Annett). At this time Neal resided with his wife and three children in Grayville, Illinois. Due to the injury, Neal's doctor imposed work restrictions. Annett offered Neal light-duty work in Des Moines, which is 387 miles from Grayville, and a motel room and transportation expenses to return to his home every other weekend.

Neal testified that before his injury, he returned home every weekend and sometimes during the week, but if he worked in Des Moines, he would only be able to return home every other weekend. Neal declined Annett's offer of light-duty work in Des Moines. In response Annett suspended Neal's workers' compensation benefits.

Procedural Background

Workers' Compensation Commission. In February 2009, an arbitration hearing was held on Neal's workers' compensation claim. In the arbitration decision, the deputy workers' compensation commissioner concluded that Annett properly suspended Neal's temporary disability benefits because he refused to accept "suitable work" offered, as required in Iowa Code section 85.33(3). The deputy commissioner also concluded that Neal had sustained a 15 percent permanent partial disability as a result of the injury.

Neal appealed the arbitration decision. On appeal, the commissioner reversed, finding that Annett had failed to offer "suitable work" because the light-duty job was located a great distance from Neal's home and Neal could not return home every weekend as he did before he was injured. The commissioner also found that Neal suffered a 60 percent partial disability. Annett petitioned for judicial review.

District Court

The district court affirmed the commissioner's finding that Neal suffered a 60 percent permanent partial disability but reversed on the issue of whether Annett offered Neal suitable work. The district court stated that Iowa Code section 85.33(3) does not define "suitable work" in terms of its location but instead whether the work offered is "consistent with the employee's disability." The district court found that the light-duty work offered to Neal was consistent with his disability and by refusing to accept the offer, he forfeited his right to temporary disability benefits during his period of refusal. Both Neal and Annett appealed the district court decision.

Iowa Supreme Court—Issues on Appeal

1. Whether the commissioner erred in concluding that Annett failed to offer suitable work to Neal for purposes of Iowa Code section 85.33(3).
2. Whether the commissioner erred in considering an improper factor (location) in reaching its factual determination regarding the suitability of the work offered to Neal.
3. Whether the commissioner erred in finding that Neal suffered a 60 percent permanent partial disability.

Analysis and Holding

Suitable Work. The Iowa Supreme Court (Court) concluded that the Legislature did not vest the authority to interpret the phrase "suitable work" for purposes of Iowa Code section 85.33(3) in the workers' compensation commissioner. The Court reached this conclusion for three reasons. First, the Legislature has made no explicit grant of interpretative authority to the commissioner. Second, while the commissioner has the authority to adopt and enforce rules, the mere grant of rulemaking does not give an agency authority to interpret all statutory language. Third, since the concept of "suitable work" is found in similar contexts, including employment discrimination, wrongful termination, unemployment compensation, and the odd-lot doctrine, "suitable work" is not a specialized phrase within the expertise of the commissioner but instead has a specialized legal meaning that extends beyond the context presented in this case. Thus, the Court did not accord deference to the commissioner's interpretation of what constitutes "suitable work" for purposes of that statue. The Court proceeded with its own analysis, and was free to substitute its own judgment of the phrase's meaning upon a finding that the commissioner made an error of law.

The Court stated that Iowa Code section 85.33(3) disqualifies an employee from receiving temporary partial, tempo-

(Legal Update—Workers' Compensation—"Suitable Work" and Industrial Disability continued from Page 8)

rary total, and healing period benefits if the employer offers "suitable work" that the employee refuses. The Court found that the language of the statute does not define "suitable work" but does require that the work offered must be both "suitable" and "consistent with the employee's disability" before the employee's refusal of the work triggers disqualification from benefits.

The Court looked at workers' compensation statutes in other states and the holdings of courts in other contexts and in other jurisdictions. The Court observed that in the absence of legislative direction, other courts have held that the location of available work may be considered in determining an employee's eligibility for workers' compensation benefits and that geographic proximity of the work to the employee's residence is commonly considered as a relevant factor in determining what constitutes an offer of "suitable work" under workers' compensation statutes. The Court also found authority for the broader proposition that geographic location may be considered in determining whether the availability of employment cuts off statutory workers' compensation benefits.

The Court held that the commissioner did not commit an error of law by considering the distance of available work from Neal's home in determining whether Annett offered "suitable work" for purposes of Iowa Code section 85.33(3) and that substantial evidence supports the commissioner's conclusion that the light-duty work offered by Annett was not "suitable work" under the circumstances of this case. The Court noted the commissioner's observation that "being away from the support of your wife and family, especially while recovering from a serious work injury, is not an insignificant matter." The Court further noted that there was no evidence in the record establishing that Neal agreed as a condition of employment to any relocation that Annett might require.

Permanent Partial Disability. The Court found that determining the amount of Neal's permanent partial disability is a mixed question of law and fact. In this situation, the Court will not overturn or modify the agency's decision unless it is irrational, illogical, or wholly unjustifiable. The Court upheld the commissioner's disability determination, finding that the evidence in this case supports the commissioner's findings and the commissioner's application of these facts to the law is not irrational, illogical, or wholly unjustifiable.

Dissent

Suitable Work. The dissent would reverse and remand on this issue by applying a standard that "suitable work" for purposes of Iowa Code section 85.33(3) may require an employee to travel temporarily so long as the work is offered in good faith to meet the needs of the company and the travel is at the employer's expense. Using this standard, geography is a relevant consideration but the fact that a temporary light-duty job may require some travel at the employer's expense is not sufficient grounds alone to make the job "unsuitable" for purposes of this statute.

Permanent Partial Disability. The dissent would reverse and remand on this issue on the basis that Neal's capabilities are essentially undisputed by the parties and there is no substantial evidence in the record to support the conclusion that Neal suffered a 60 percent loss in earning capacity as a result of his shoulder injury.

LSA Monitor: Ann Ver Heul, Legal Services, (515) 281-3837.